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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM FARRELL, PETITIONER

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of New York, which appears at pages 10–25 of the printed records is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 36–43) is reported at 167 F. 2d 781.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1948 (R. 43). A petition for rehearing was denied on June 11, 1948 (Tr.

296). The petition for a writ of certiorari was filed on September 9, 1948, and was granted on November 22, 1948 (R. 44). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a seaman who, through his own negligence and not as a result of any negligence on the part of his employer, was permanently and totally disabled by injuries sustained while he was on his employer's premises in the process of returning to his ship from shore leave, is entitled to continue receiving maintenance and cure indefinitely, where it is established that the seaman has already received the maximum cure that medical and surgical aid may accomplish.

2. Assuming that a permanently and totally disabled seaman is entitled to maintenance and cure beyond the time when the maximum cure possible has been attained, whether a lump sum award as future maintenance and cure is proper.

3. Whether a seaman who joins a crew already under shipping articles for a foreign voyage "and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" may recover wages until the expiration of twelve months from the date he joined the ship rather than to the end of the voyage.

STATUTE, REGULATION, AND CONVENTION INVOLVED

The pertinent provisions of R. S. 4511 as amended, 46 U. S. C. 564, and the Secretary of the Navy's order of March 6, 1942, waiving compliance therewith, 46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, are set forth in the Appendix, *infra*, pp. 37–39. Article 4, Clause 1, and Article 12, of the Shipowners Liability Convention of 1936, 54 Stat. 1696, 1700, are set forth in the Argument, *infra*, at pp. 18–19.

STATEMENT

Petitioner, a Government-employed merchant seaman, brought suit in admiralty against the United States and others to recover damages under the Jones Act (41 Stat. 1007, 46 U. S. C. 688), and maintenance, cure and wages under the federal maritime law (R. 1–7). Petitioner's suit was based upon injuries received at Palermo, Sicily, on February 5, 1944, when he fell into a drydock in the course of returning to his ship, the S. S. *James E. Haviland*, from authorized shore leave (R. 28–29). As a result of this accident, petitioner became permanently blind, suffers headaches, and is subject to occasional epileptic seizures (R. 33, 43). Petitioner was hospitalized in various Government hospitals from the date of his injury until June 30, 1944, at which time he was discharged at Norfolk, Virginia, as completely disabled (R. 32, 42). Both courts below found that he has received the maximum cure that medical treatment and surgical aid could

accomplish, but that from time to time he will require some medical care to relieve his attacks of headaches and epileptic convulsions (R. 33, 43).

There is no need herein to set forth in detail the circumstances surrounding petitioner's accident, since both courts below have held, upon a careful review of all the evidence, that it was occasioned by petitioner's own conduct and was not attributable to any negligence on the part of his ship or those in charge of her (R. 31–32, 38–40). Both courts below accordingly denied petitioner's claim for damages under the Jones Act, and petitioner does not here challenge their ruling (Pet. 2). He does, however, challenge their rulings as to his claims for maintenance and cure, and for wages.

Petitioner sought maintenance and cure in the amount of $50,000 (R. 6–7). Although this claim was purportedly based on past expenditures and anticipated future expenditures for medical treatment (Paragraph 36 of Libel, R. 6), petitioner did not adduce in support of his claim any evidence as to the anticipated need for medical treatment or its cost, or the cost of maintenance while undergoing such treatment.[1] On the basis of its finding that maximum cure had been accomplished, the district court awarded petitioner

[1] As we pointed out in our brief in opposition (p. 9), the only evidence adduced by petitioner was a showing, by mortality tables, of a 40.17-year life expectancy. The amount of maintenance and cure demanded appears to result from multiplying this life expectancy by a fixed per diem allowance (of $3.50), with the result stated in round figures.

maintenance for six months after his discharge from the hospital at Norfolk (on June 30, 1944) as the reasonable period for maintenance during which maximum cure would be attained,[2] and also an amount to cover his expenses up to the time of the trial (June 10, 1947 (R. 24)) for medicine and private medical care (R. 33–34). This award was affirmed by the court below (R. 42–43). Both courts below held that the duty of the ship owner to provide maintenance and cure does not extend beyond the time when the maximum cure possible has been effected, with the district court holding in addition that in any case a lump sum award for future maintenance and cure was prohibited by this court's decision in *Calmar S. S. Corporation v. Taylor,* 303 U. S. 525 (R. 24, 33, 41, 43).

Petitioner's suit also embraced a claim for wages from March 28, 1944, when his ship completed her voyage at New York, until December 16, 1944, the end of the 12-month period from the date on which he joined the ship (Pet. 16–21). Petitioner was not one of those who joined the Haviland at the outset of her voyage, but he signed on from the War Shipping Administration's Replacement Pool at Naples, Italy, on December 16, 1943 (R. 26, 27). Both courts below limited petitioner's recovery of wages to the duration of the voyage (R. 33, 40).

[2] The district court's allowance for maintenance and cure was at the rate of $3.50 per day (R. 24).

SUMMARY OF ARGUMENT

I

Both courts below having found that the accident which resulted in petitioner's permanent disability was caused solely by his own negligence, his right to recover is limited to maintenance and cure, along with wages to the end of the voyage. As to maintenance and cure, both courts below held that petitioner's right did not extend beyond the time when the maximum cure possible had been attained, and having found that he has received the maximum cure that medical treatment and surgical aid may accomplish, made an award accordingly. The rule thus applied by the courts below is fully supported by judicial precedent. Petitioner contends, however, that he is entitled to recover in this proceeding a lump sum award as maintenance and cure for life because of his permanent disability, relying upon a dictum in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, that "a more liberal application of the rule" might be called for in "those cases where the incapacity is caused by the employment." This dictum, if it embodied a rule, would be inconsistent with the holding of this court in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, that the availability of maintenance and cure should not depend upon distinctions in a seaman's activity at the time he becomes ill or is injured. However, the dictum was not the enunciation of a rule but merely the reserva-

tion of the question in the event that a later case should present considerations not present in the *Calmar* case. Petitioner does not advance any considerations to justify the establishment of a double standard of maintenance and cure, favoring those whose incapacity is "caused" by their "employment." Indeed, there are no considerations which justify the unequal application of the doctrine of maintenance and cure.

The doctrine that an injured seaman's right to maintenance and cure does not extend beyond the time when he is cured as far as possible, well established by judicial precedent, received formal expression in Article 4, Clause 1, of the Shipowner's Liability Convention of 1936, which, although it added nothing to the rule, nevertheless embraced the full limits of the doctrine. Whatever may be the power of this Court to vary the provisions of this Convention by broadening the rule, we believe that by its activity in the field of seamen's rights Congress has pre-empted the field, and has indicated clearly its approval of the existing scheme of remedies. The seamen's rights of maintenance and cure and the general maritime cause of action for unseaworthiness—the remedies developed by judicial decision—were supplemented by the enactment of the Jones Act, so that the final step in the formulation of the composite remedy now available to seamen was brought about by Congressional action. Despite repeated efforts to substitute for this

composite remedy a comprehensive statutory workmen's compensation system, Congress has left the present remedies undisturbed, at the insistence of seamen's representatives. In doing so, Congress was unquestionably aware of the rule that an injured seaman's right to maintenance and cure ends when a maximum cure had been obtained. In view of the paramount power of Congress to determine the remedies to be afforded seamen injured while engaged in maritime service, the failure of Congress to make any change in existing remedies can only be taken as an implied approval and adoption of the doctrine consistently stated in the prior court decisions. Thus, the extension by judicial action of the doctrine of maintenance and cure as it is now stated in Article 4 of the Shipowner's Liability Convention would, we submit, run counter to the position which Congress has taken in this same field.

II.

Whatever the duration of the right of a permanently injured seaman to maintenance and cure, this Court held without qualification in the *Calmar* case that a lump sum award of anticipated future maintenance and cure for life was improper. In refusing petitioner such a lump sum award the district court relied specifically upon the *Calmar* decision. Moreover, there is no evidence here as to the cost of anticipated neces-

sary medical treatment or of maintenance while such treatment is being received. Absent such evidence, there is no basis for an award of future maintenance and cure. This is dispositive of petitioner's claim to anything beyond what he has already been awarded in this action, without regard to the duration of his right to maintenance and cure. If petitioner can establish in a later proceeding that he has received further treatment of a curative nature, then on that record he may be able to recover the expenses of such treatment, together with maintenance.

III

Petitioner claims that under the terms of his shipping articles he was entitled to wages for twelve months after the date he joined the ship, even though the voyage was completed earlier. Petitioner's shipping articles, in compliance with controlling wartime regulations, were in the same form as the articles of every other ship departing from ports of the United States during that period. These articles did not impose on petitioner an absolute legal obligation to serve for twelve months, but only until the ship returned "to a final port of discharge in the United States." Where a seaman is injured while under articles such as are commonly used in the coastwise trades, providing for one or more short voyages to be made within a specified number of months, the stated period of time is taken as the

duration of his right to wages. This is not such a case. Here the form of the articles was such as is used for foreign voyages, and clearly contemplated only one voyage, to which the seaman's right to wages is limited. In view of the fact that every seaman shipping from a United States port during the war was under similar articles, and that seamen are traditionally reluctant, when shipping in foreign trade involving long voyages, to bind themselves to contracts for stated periods of time rather than for a specified voyage, the construction of the articles urged by petitioner is obviously erroneous.

ARGUMENT

The petition[2] in this case presents contentions with regard to two aspects of the composite remedy available to seamen in cases of personal injury, namely, the right (a) to maintenance and cure, and (b) to wages. Petitioner is a seaman who is permanently disabled as the result of an accident caused solely by his own negligence. Accordingly, he is without the right to recover damages under the Jones Act (46 U. S. C. 688), or on account of unseaworthiness. Both courts below so held and petitioner does not here challenge their rulings (Pet. 2). Moreover, petitioner has been awarded the amount of maintenance and cure, and of wages, to which he is

[2] We refer to the petition for certiorari inasmuch as no brief on the merits has been filed herein by petitioner.

entitled in this case in accordance with established law.

Petitioner's present claim of a further sum on account of maintenance and cure is a demand for a lump sum award equivalent to maintenance and cure for life (R. 6, 41). The large sum demanded ($50,000 in the libel) appears to encompass, in greatest part, a claim for a per diem allowance for the rest of petitioner's life (fns. 1 and 2, *supra*, pp. 4–5), and only in minor degree does it cover possible future medical expenses to relieve his symptoms. As we have pointed out (*supra*, p. 4), petitioner did not present in support of his claim any evidence as to the anticipated need for medical treatment or its cost, or the cost of maintenance while undergoing such treatment; and the courts below have found, as to future treatment, only that "some medical care" will be required "from time to time" to alleviate petitioner's attacks of headaches and epileptic convulsions (R. 33, 43). *Supra*, pp. 3–4. The demand for a lifetime award based on a per diem calculation apparently derives from petitioner's theory that he is entitled to recover intermittent palliative medical expenses, and that the recovery of such expenses from time to time carries with it a right to an uninterrupted maintenance allowance as a lifetime out-patient.

In our view, neither portion of the claim is recoverable, despite the appeal which the hard-

ship of petitioner's plight lends to his contentions. Well established case and statutory law, and clear Congressional understanding in the field of seaman's remedies, permit recovery of maintenance and cure only until the sick or injured seaman has been cured, if cure is possible, or until the sickness or incapacity has become chronic or permanent. In disregarding these rules, petitioner is seeking from this Court relief not available to him under the system of remedies presently provided for seamen, and which can only be created, we submit, by Congressional action.

Petitioner's claim for a lump sum award can also, and in our view might well be, disposed of on the narrower grounds that the present record contains no basis on which an award looking to the indefinite future can be justified or grounded, and that, whatever the scope or duration of the shipowner's liability, lump sum awards covering lengthy periods of future maintenance and cure are not countenanced.

I

A PERMANENTLY DISABLED SEAMAN IS NOT ENTITLED TO FURTHER MAINTENANCE AND CURE AFTER A MAXIMUM CURE HAS BEEN ATTAINED

1. In *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, this Court, after examining the authorities dealing with t shipowner's obligation to provide maintenance and cure in the case of a chronic illness, concluded that it could "find no basis for

saying that * * * the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment." 303 U. S. at 530.[4] This was but the enunciation of a well established principle, as federal admiralty courts had always recognized that in some cases of illness or injury a positive cure is impossible, and had uniformly held in such cases that the shipowner's liability ended when the seaman was cured as far as possible. *The Point Fermin,* 70 F. 2d 602, 604 (C. A. 5); *The Pochasset,* 295 Fed. 6, 9–10 (C. A. 1); *The Kenilworth,* 144 Fed. 376, 378–379 (C. A. 3), certiorari denied *sub nom. Krelly* v. *The Kenilworth,* 202 U. S. 617; *Sickner* v. *Great Lakes Transit Corporation,* 17 F. Supp. 330, 331 (W. D. N. Y.); *The C. S. Holmes,* 209 Fed. 970, 975 (W. D. Wash.); *Raymond* v. *The Ella S. Thayer,* 40 Fed. 902, 904 (N. D. Cal.). See *Skolar* v. *Lehigh Valley R. Co.* 60 F. 2d 893, 895 (C. A. 2); *The Bouker No. 2,* 241 Fed. 831, 835 (C. A. 2), certiorari denied *sub nom. Jones* v. *Bouker Contracting Co.,* 245 U. S. 647; *The Nyack,* 199 Fed. 383,

[4] The Court of Appeals is plainly right in stating that the *Calmar* opinion's reservation to the claimant of the right to bring a later suit to recover further maintenance and cure "to which he may then be entitled" (303 U. S. at 531–2) rests on the fact that the seaman in that case "was not at the time of the trial as cured as he could ever possibly be" (R. 42–3).

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391 (C. A. 7); *The Mars,* 149 Fed. 729, 731 (C. A. 3); *Whitney* v. *Olsen,* 108 Fed. 292, 297 (C. A. 9); *Kahyis* v. *Arundel Corporation,* 3 F. Supp. 492, 495 (D. Md.); *The City of Alexandria,* 17 Fed. 390, 393–394 (S. D. N. Y.); *Reed* v. *Canfield,* Fed. Cas. No. 11,641, p. 429 (C. C. D. Mass.); *Schooner Balsa,* 1924 A. M. C. 1333 (E. D. Pa.). As this Court later expressed it in *De Zon* v. *Amer. President Lines,* 318 U. S. 660, 667, fn. 3, "The duty is not to 'cure' in the literal sense, but to provide care, including nursing and medical attention." Since the *Calmar* decision, the lower federal courts have reaffirmed as settled doctrine the rule that a seaman who contracts an incurable disease or is permanently disabled by injury in the course of his employment is not entitled to maintenance and cure beyond the time that a maximum cure is attained. *Luksich* v. *Misetich,* 140 F. 2d 812, 814 (C. A. 9), certiorari denied, 322 U. S. 761; *The Josephine & Mary,* 120 F. 2d 459, 464 (C. A. 1); *Lindgren* v. *Shepherd S. S. Co.,* 108 F. 2d 806, 808 (C. A. 2); *Mahnich* v. *Southern S. S. Co.,* 45 F. Supp. 839, 841 (E. D. Pa.), affirmed, 129 F. 2d 857 (C. A. 3), reversed on other grounds, 321 U. S. 96; *The W. H. Hoodless,* 38 F. Supp. 432, 434 (E. D. Pa.), affirmed *sub nom. Armit* v. *Loveland,* 115 F. 2d 308 (C. A. 3); *Miluton* v. *Princ Pavle,* 1942 A. M. C. 259, 261 (D. Md.); see *Montillo* v. *United States,* 70 F. Supp. 181, 185 (E. D. N. Y.); *Lynskey* v. *Great Lakes Transit Corpora-*

tion, 42 F. Supp. 816, 817 (W. D. N. Y.); cf. *Loverich* v. *Warner Co.*, 118 F. 2d 690 (C. A. 3), certiorari denied, 313 U. S. 577.

This rule was applied in the case at bar by the courts below, both of which found that petitioner has received the maximum cure that medical treatment and surgical aid may accomplish (R. 33, 41, 43).[5] In apparent recognition of the force and present applicability of the rule, petitioner seeks to base his claim to maintenance and cure for life upon a remark in the *Calmar* opinion (303 U. S. at 530) that "a more liberal application of the rule" *might* be called for in "those cases where the incapacity is caused by the employment" (Pet. 12–14).[6] We have found nothing in any other decision by this Court or any other federal court (including the lower court cases cited in *Calmar*)

[5] In view of this concurrent finding, it is clear that the courts below considered the medical care necessary to alleviate petitioner's attacks of headaches and possible epileptic convulsions to be merely palliative and not curative treatment. We do not contend that the judgment in this case forecloses petitioner's right to a further recovery should some future advance in medical or surgical art make possible a more complete cure. *Tol* v. *United States*, 166 F. 2d 775, 778 (C. A. 9); see *infra*, pp. 29–30.

[6] Contrary to petitioner's suggestion (Pet. 16), the court below expressly reserved decision on the question whether petitioner's injury was caused by his employment, stating merely that as he was "on shore leave, in the process of returning to his ship, and on the employer's premises, the point seems arguable, it not being clear that the injuries were received as a result of intoxication or some other willful misbehavior" (R. 41).

which even intimates that there is or should be such a double standard in the doctrine of maintenance and cure. On the contrary, this Court has specifically rejected the notion that the availability of relief by way of maintenance and cure should depend upon distinctions in a seaman's activity at the time he becomes ill or is injured. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735–737. Since the shipowner's liability for maintenance and cure arises regardless of his fault, there is no reason for establishing varying degrees of liability under the doctrine. The needs of permanently disabled seamen are the same without regard to the circumstances in which the disability was incurred. And tenuous differences in such circumstances give rise to no considerations of logic or fairness which justify the establishment of a rule of uneven access to maintenance and cure. Cf. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735, fn. 23.

In fact, the *Calmar* dictum did not contemplate the automatic application of a more liberal rule in cases where the incapacity was caused by the employment. The suggestion of the Court that, in such cases "* * * considerations not present here may apply * * *" (303 U. S. at 350), indicates that the Court announced no rule, contrary to petitioner's contention, but was merely leaving the question open so as to be unembarrassed in prescribing a more liberal rule in the event special considerations could be shown to

justify it. Petitioner's reliance on the dictum is not supported by considerations which would justify special treatment in his case. Weighing his claim in the light of the reasons underlying the shipowner's duty to provide maintenance and cure, there is no consideration present here which is not also present in every other case where, without wilful misconduct, a seaman under articles falls sick or is injured.[7] Thus, even assuming *arguendo* that petitioner's incapacity was "caused" by his "employment", the significance of that fact in relation to the reasons underlying the doctrine of maintenance and cure is not shown. We submit that, as the Court of Appeals held (R. 41–2), there is no such significant relation, and that petitioner's claim to maintenance and cure for life finds no support either in historic policy or judicial precedent.

2. The rule that a shipowner is under the duty to provide maintenance and cure only until a

[7] "* * * The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden* v. *Gordon*, Fed. Case No. 6047 (C. C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 528. See *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735.

maximum cure has been effected does not rest upon judicial precedent alone. The Shipowners' Liability Convention of 1936, 54 Stat. 1693, which became effective on October 29, 1939, provides as follows in Article 4, Clause 1 (54 Stat. 1696):

> The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, *or until the sickness or incapacity has been declared of a permanent character.* [Italics supplied.]

This description of the shipowner's liability, though couched in different terms, is substantially the same as that contained in the cases cited above (*supra*, pp. 12–15), for a sickness or incapacity must necessarily be declared of a permanent character when, though not completely cured, it has been cured as far as possible.[8] Thus, this treaty provision added nothing to the doctrine of maintenance and cure as it already had been developed by case law in this country, but it did embrace the full limits of that doctrine.

Absent other considerations, this Court might find in itself, by a broad construction of Article

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[8] Article 4, Clause 1, of the Shipowners' Liability Convention of 1936 is self-executing and does not require implementing legislation. See letter of Secretary of State to the President, dated June 12, 1939, quoted in H. Rep. No. 1328, 76th Cong., 1st sess., p. 7. Cf. concurring opinion of Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones*, 318 U. S. 738.

12 of the Convention,[9] a power to vary the provisions of Article 4 comparable to the function of development which it exercises with regard to past judicial precedent. In our view, controlling considerations which limit the exercise of such power are here present. These considerations derive from the history and nature of Congressional activity in the familiar legislative field of seamen's rights, which point to Congress as the only proper innovator in this area. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 315–316.

3. The right to maintenance and cure, and the right of action against the vessel and her owner for indemnity for injuries caused by unseaworthiness, comprise the seaman's historic relief springing from the general maritime law. *The Osceola*, 189 U. S. 158. In Section 20 of the Seaman's Welfare Act of 1915 (Act of March 4, 1915, c. 153, sec. 20, 38 Stat. 1164, 1185), Congress made its first effort to modify the maritime law to provide additional relief, by providing that in an action for injuries sustained on board a vessel or in its service seamen having command should not be considered fellow servants of their subordinates.

[9] Article 12 of the Shipowners' Liability Convention of 1936 provides (54 Stat. 1700):

"Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention."

The effort accomplished nothing, however, as this Court held that the maritime law already imposed liability upon the shipowner for wages, maintenance, and cure where a crew member was injured at sea by reason of another's negligence, regardless of their relationship, and that Section 20 did not extend the measure of that maritime liability to the full scope of the liability imposed by the common law upon an employer on shore. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. Congress thereafter passed the Jones Act (Act of June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. 688) giving seamen a right of action against the shipowner for injuries resulting from negligence, and abolishing the traditional defenses based on the fellow servant rule and assumption of risk. In so doing, Congress must be considered as having asserted its paramount right to determine the remedies of maritime workers. Cf. *Gilvary* v. *Cuyahoga Valley Ry.*, 292 U. S. 57, 60–61; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 101–103; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 151–152, 153.

The protection afforded by the composite remedy consisting of the general maritime law and the Jones Act, while broad, is not complete. If a seaman is injured through the negligence of the owner or the unseaworthiness of the ship, he is fully protected, in theory at least, by his right of action, regardless of whether the dis-

ability resulting from the injury is permanent or merely temporary; and he has, in addition, the right to maintenance and cure. On the other hand, if the seaman's injury is not a result of negligence or unseaworthiness, his right to maintenance and cure is the only relief available to him. But maintenance and cure affords adequate protection only in the case of minor injuries causing merely a temporary disability. It is entirely inadequate if the disability is permanent, because, as we have pointed out (*supra*, pp. 12–15), the accepted doctrine is that "cure" does not mean a positive cure, which may be impossible, but only care until the maximum possible cure has been effected. Thus where, as here, a seaman is permanently disabled through his own negligence, the shipowner's liability for maintenance and cure does not continue as long as the disability exists, but ends when the maximum cure has been attained.

In the case of industrial employees on shore, the hardship on the individual and the burden on society in such cases have been relieved by workmen's compensation statutes which impose on the employer, as one of the incidents of doing business and as a direct charge on the industrial operation, the cost of providing medical care and weekly compensation to the employee injured in the course of his employment, and in the event of death as the result of such injuries, compensa-

tion to his dependents. Under workmen's compensation, the employer, because of the imposition of liability without fault in all cases, is relieved of the hazard of large verdicts in cases where he has been negligent. The employee benefits by the certainty of recovery whatever the cause of the injury and by the provision for immediate medical care. These are likewise benefits to society at large, since an injured workman presents the same sociological problem whether his injury resulted from his own or his employer's negligence, or was wholly accidental.

Although Congress provided compensation coverage for some maritime workers by the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. 901–950, all efforts to extend such coverage to masters and crew members have been frustrated by the opposition of the representatives of the various seamen's organizations, as this Court has pointed out on numerous occasions. See *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 159–160; *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256–257; *Norton* v. *Warner Co.*, 321 U. S. 565, 570; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 715. The reason for this opposition was summarized in a brief by Max Lustig, Assistant General Counsel for the National Maritime Union, in these words (Hearings before the House Committee on Mer-

chant Marine and Fisheries, 76th Cong., 1st sess., on H. R. 6726 and H. R. 6881, p. 83):

> The answer is to be found in the United States statute books and general maritime laws affecting seamen who are injured. Upon an analysis we find that the existing maritime laws amply afford all of the protection that a seaman needs when his injuries are minor and not of a totally disabling kind. That protection is guaranteed by the provisions generally known as maintenance and cure. But, in addition to maintenance and cure, the law guarantees to seamen the right to maintain an action against the steamship owner, to recover by trial, before a court and jury, damages for partial or total disability.

Thus, despite the fact that all the other leading maritime nations of the world have applied the principle of workmen's compensation to seamen,[10] and despite the earnest recommendation of impartial observers that this country do likewise,[11] seamen have consistently rejected the more cer-

[10] The nations which have done so include Denmark, France, Germany, Great Britain, Holland, Italy, Norway, and Sweden. See Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, p. 17.

[11] See *e. g.*, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, pp. 79–80, 154–156, 162–163, 181–187, 187–188, 292–296. The case for the application of workmen's compensation to seamen was well stated by James C. Healy, Director of the Seamen's House, Y. M. C. A., New York

tain, if more modest, benefits of a compensation statute for a possibly greater recovery under the Jones Act. "Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust v. Moore-McCormack Lines,* 328 U. S. at 715. Whatever may be said as to the wisdom of this choice, the fact remains that it has been the basis of a consistent Congressional policy since the passage of the Jones Act in 1920 to leave undisturbed the existing scheme of remedies available to masters and crew members.[12] And, of course, the general authority of Congress to determine the remedies to be afforded seamen injured while engaged in

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City, in discussing certain statistics, when he said (p. 183): "And I would like to speak a word, not for the 8 men who received damages which extended from about $5,000 to $34,000, in that first bracket of 8, I would like to speak a word to the men that only received about $65, or $130 if you give them the gross, to $2,500—in other words, out of the 34 men, 8 received substantial awards, about 26 received very, very small awards, and in some cases received no awards, or the decision was against them. It is those men that I contact, those are the men that I have the conversations with, the men who have gone up and lost, and I feel that any compensation act which would stabilize it so that that particular group of men would receive more, without litigation, would be for the benefit of the industry and for the benefit of the seamen."

[12] See Hearings before Subcommittee of Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, p. 111, referring to the opposition of seamen and their representatives to such legislation in 1922, 1927, 1939 and 1940.

maritime service is beyond dispute. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 42; *Crowell* v. *Benson*, 285 U. S. 22, 39; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215.

During the many hearings which have been held before Congressional committees considering the enactment of comprehensive statutory coverage for the entire maritime industry, the relative merits of existing remedies as compared with proposed systems have been explored exhaustively. During these hearings, it was clearly understood that the shipowner's liability for maintenance and cure ended when a maximum cure had been attained.[19] Moreover, the duration of that liability

[19] *E. g.*, Max Lustig, Assistant General Counsel, National Maritime Union, said in a brief filed with the House Committee on Merchant Marine and Fisheries (Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st sess., on H. R. 6726 and H. R. 6881, p. 83): "Seamen are usually injured while on a voyage, and upon receiving an injury, he becomes entitled to: * * * 3. Maintenance * * * during—(a) the period that a seaman receives treatment at a hospital either as an in-patient or an out-patient; and (b) during a period of convalescence, *and until the maximum cure is obtained.*" [Italics supplied.] See also Mr. Lustig's statement (quoted *supra* at p. 23), that maintenance and cure afford adequate protection when a seamen's "injuries are minor and not of a totally disabling kind."

In a brief submitted in connection with the same hearings, Harry Lundeberg, representing the Sailors Union of the Pacific and the Seafarers International Union of North America, said (Hearings, p. 131): "Under the general maritime law now in effect the seamen are entitled to what is known as maintenance and cure. By this it is

being so well settled by judicial decisions (*supra*, pp. 12–15), Congress must be presumed to have had this settled rule in mind during the consideration of proposed changes in the maritime law. Cf. *United States* v. *Hill*, 248 U. S. 420, 424. The failure of Congress to make any change in the rule clearly constituted an implied approval and adoption of the doctrine consistently stated in the earlier court decisions. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 428. Cf. *Shapiro* v. *United States*, 335 U. S. 1, 16; *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14; *Missouri* v. *Ross*, 299 U. S. 72, 75; *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320, 336.

4. In sum, petitioner's contention that maintenance and cure, one aspect of the composite remedy available to seamen in personal injury matters, should now be expanded to embrace lifetime compensation not related to medical cure and based on liability without fault, is a request that this Court give virtually the full equivalent of the general damages which petitioner was unable to recover under the Jones Act. Certainly, it is a request for at least the equivalent of the full permanent disability benefits to which seamen

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meant that if a seaman becomes ill or is injured in the service of his ship, he can obtain medical service including hospitalization. In addition a seaman is entitled to recover maintenance while outside of the hospital *until his physical condition becomes fixed.* * * *" [Italics supplied.]

would be entitled under a complete statutory workmen's compensation system, which Congress has consistently refused to adopt. The contention is without support in the decided cases. It is in square conflict with Article 4 of the Shipowners' Liability Convention. And it seeks action by this Court which, we submit, would clearly run counter to the position taken by Congress in the same field.

II

A LUMP SUM AWARD AS FUTURE MAINTENANCE AND CURE FOR LIFE IS IMPROPER IN ANY EVENT

Even assuming *arguendo* that petitioner is correct in his contention that he is entitled to maintenance and cure for life, it does not follow that he is entitled to recover all such future maintenance and cure as a lump sum award in this proceeding. Whatever doubts there may be as to the interpretation of certain expressions in other portions of the *Calmar* opinion, this Court there held without qualification that "the award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 530.[14] The measure of the seaman's recovery

[14] It should be noted that the Court expressly limited its *caveat* concerning "incapacity * * * caused by the employment" (*supra*, p. 15) to the question of the duration of the duty to provide maintenance and cure in the case of a chronic illness. 303 U. S. at 530.

in each case was said to be "the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained." 303 U. S. at 531–532. Measured by this standard, petitioner has received all to which he is entitled in this proceeding.

The rationale of the *Calmar* decision is equally applicable to the case at bar. In that case, the lump sum award to cover the cost of maintenance and cure for life was reversed by this Court on three grounds: because (1) the amount and character of the future medical care required cannot be measured by mortality tables; (2) in the marine hospital service the seaman may be treated without expense or in some cases at minimum expense; and (3) the necessity of safeguarding the seaman in case of illness against the consequences of his own improvidence is not met by the payment of a lump sum to cover expenses for medical care during life. 303 U. S. at 530–531. It is impossible now to calculate the cost of whatever medical treatment petitioner may require in the future and there is no reason to believe that such medical care cannot be had through the marine hospital service. Moreover, the necessity of safeguarding the seaman against the consequences

of his own improvidence has not been exaggerated. The experience of the United States Employees' Compensation Commission (now the Bureau of Employees' Compensation), in administering the Longshoremen's and Harbor Workers' Compensation Act, has demonstrated that in 85% of the cases in which the Commission permitted a lump settlement, the settlement ultimately proved to be much less beneficial to the claimant that a weekly payment would have been. See testimony of Commissioner John J. Keegan, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3rd sess., on H. R. 6881, p. 297. Such unfavorable results in selected cases investigated and approved by experienced personnel confirms the wisdom of this Court's disapproval of lump sum awards to seamen as future maintenance and cure.

The Government does not contend that petitioner is necessarily barred for all time from any further recovery of maintenance and cure by the finding here that he has received the maximum cure that medical treatment and surgical aid may accomplish. That finding obviously must be limited to the record here presented. The decree of the district court deals with petitioner's right to maintenance and cure only as of the time of the trial (R. 35). If at any time in the future petitioner can establish that in some way, as through an advance in medical or surgical science, he has

received further treatment of a curative nature, he may be entitled to recover in a new proceeding the amount expended for such treatment and for maintenance during the treatment. Cf. *Tol* v. *United States,* 166 F. 2d 775, 778 (C. A. 9); *Rey* v. *Colonial Nav. Co.,* 116 F. 2d 580, 583 (C. A. 2); *Moyle* v. *National Petroleum Transport Corporation,* 150 F. 2d 840, 842 (C. A. 2). And even if petitioner is thought entitled to recover for possible future medical care merely alleviating his headaches and convulsions (R. 33, 43), he has no present right to such an award. Whatever may be the duration of petitioner's right to maintenance and cure, a recovery therefor is improper without proof of expenditures or liability incurred. *Johnson* v. *United States,* 333 U. S. 46, 50; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 531; *Robinson* v. *Swayne & Hoyt,* 33 F. Supp. 93 (S. D. Cal.). We submit, therefore, that regardless of whether this Court holds that petitioner's right to mainfenance and cure extends beyond the time when he is as completely cured as he ever can be, the judgment here includes everything which he is entitled to recover in this proceeding, and any further recovery by him must await the bringing of a new proceeding after further liability, if any, has accrued.

III

PETITIONER IS NOT ENTITLED TO WAGES BEYOND THE END OF THE VOYAGE

Petitioner did not sign on as a part of the original crew of the *Haviland* when she began her voyage at Philadelphia, but instead signed on that vessel at Naples, Italy, on December 16, 1943 (R. 26–27). The *Haviland's* articles described the voyage as "from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" (Petitioner's Ex. 3). This voyage was completed at New York on March 28, 1944 (R. 40). Both courts below held that petitioner was not entitled to wages after that date (R. 33, 40).

Petitioner contends that under these articles his right to wages extended for twelve months from December 16, 1943, the date he joined the vessel, since he was under "a legal obligation to serve for twelve months, if required by the respondents" (Pet. 19). The language of the articles shows plainly, however, that petitioner's legal obligation to serve did not extend beyond the

termination of the voyage by the return of the ship "to a final port of discharge in the United States." Certainly none of the original crew would have violated his contract by quitting the ship after the termination of its voyage at New York on March 28, 1944. *The Edwin,* 23 Fed. 255 (S. D. N. Y.). The fact that petitioner joined the ship long after the articles were first opened, when the voyage was about half completed, does not mean that his right to wages is different from that of the seamen who signed on at the start of the voyage. *Gardner* v. *The New Jersey,* Fed. Cas. No. 5233 (D. Pa.).

Petitioner asserts that the word "voyage" is not used in the articles and contends that the court below erred in deciding this case as though it were (Pet. 17). This contention, however, does not take into account all of the provisions of the articles. The *Haviland's* articles were prepared on a standard printed form, and the language under construction was inserted in that portion of the printed form as to which the following instruction was given in a footnote (Petitioner's Ex. 3):

> Here the nature of the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

The language used in completing this portion of the printed form was required by this instruction to be a *voyage description*. Considered as such, the fact that the term "voyage" was not included therein is without significance.

It should be noted that the articles which are under consideration here are not unique in form. R. S. 4511, as amended, 46 U. S. C. 564, (*infra*, p. 37), requires that all shipping articles state the nature and, as far as practicable, the duration of the intended voyage, and the port at which it is to terminate. During the war, it was undesirable to disclose the precise voyage on which a ship was preparing to set out and, under the authority of emergency war powers, the Secretary of the Navy waived compliance with this requirement of R. S. 4511, and prescribed a more indefinite form of "description of voyages" to be used. See Appendix, *infra*, pp. 38–39. The articles of the S. S. *James E. Haviland* followed the prescribed form. They were, therefore, in the same form as were the articles for every ship which left a port of the United States during the time that this order of the Secretary of the Navy was in effect. According to petitioner's contention, every seaman who shipped under these articles bound himself to serve a specified number of months, rather than for a voyage. This construction of the articles is contrary to the immemorial practice of seamen, and is, we submit, obviously erroneous.

As a practical matter, petitioner fails to recognize the distinction between articles for a foreign voyage and those used in the coastwise trades. Since coastwise voyages are comparatively short, the articles are frequently written to cover one or more voyages, for a term not to exceed a specified number of months, commonly with the right in either party to terminate on notice at the end of any voyage. Where a seaman employed under such articles is injured, the ship owner is not permitted to take an unconscionable advantage of him by terminating his employment at the end of the next voyage, but the employment is considered as continuing for the entire term of the articles. *Jones* v. *Waterman S. S. Corporation,* 155 F. 2d 992, 996 (C. A. 3); *Enochasson* v. *Freeport Sulphur Co.,* 7 F. 2d 674 (S. D. Tex.); *McCarron* v. *Dominion Atlantic Ry. Co.,* 134 Fed. 762 (D. Mass.). On the other hand, foreign articles normally cover only a single voyage to be terminated at a final port of discharge, the maximum time limit for the voyage being inserted for the protection of the seamen. Under foreign articles, the term of employment is therefore the single voyage, ending at the final port of discharge, and not the period of time provided as its maximum limit. *The Thomas Tracy,* 24 F. 2d, 372, 374 (C. A. 2); *The Ipswich,* 46 F. 2d 136, 138 (D. Md.); *Pell* v. *American West-African Line, Inc.,* 1939 A. M. C. 346 (S. D. N. Y.); *The*

Catalonia, 236 Fed. 554 (E. D. Va.); *The Falls of Keltie*, 114 Fed. 357, 359 (D. Wash.). See *The Mermaid*, 115 Fed. 13 (C. A. 9). This is in keeping with the traditional reluctance of seamen to bind themselves to contracts for stated periods of time, and their preference to be through with a vessel when a long voyage ends.

R. S. 4517, 46 U. S. C. 570, and Section 19 of the Act of June 26, 1884, 23 Stat. 58, 46 U. S. C. 572, cited by petitioner (Pet. 17), do not support his contentions. There is nothing in this record to show that petitioner was not engaged in the presence of the proper official as required by the statutes, or that petitioner's rights have been prejudiced in any way by any failure to comply with their provisions. The meaning of the term "final port of discharge" as used in shipping articles is well settled. It means that port at which the vessel is completely relieved of her cargo and thus becomes ready for another venture. *The Larimer*, 174 Fed. 429 (E. D. Pa.); *Schermacher* v. *Yates*, 57 Fed. 668 (E. D. N. Y.); *Hellevik* v. *American Sugar Transit Corp.*, 261 App. Div. 591, 594, 595, 26 N. Y. S. 2d 724. This being true, we submit that there was no ambiguity in the articles, and that the court below was clearly correct in holding that petitioner's term of employment ended on March 28, 1944, with the termination of the voyage of the *Haviland* at New York.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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APPENDIX

Statute and Regulation Involved

1. R. S. 4511 as amended, 46 U. S. C. 564, provides in pertinent part:

> The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West Indian Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:
>
> First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.
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> * * * * *

2. The Secretary of the Navy's order of March 6, 1942, waiving compliance with certain of the provisions of R. S. 4511 as amended, 46 C. F. R.

(1943 Supp), Appendix A, p. 2080, 7 F. R. 2477, provides:

DESCRIPTION OF VOYAGE IN SHIPPING ARTICLES

By virtue of the authority vested in me by the provisions of Executive Order No. 8976, dated December 12, 1941 and Executive Order No. 9083, dated February 28, 1942 (3 CFR Cum. Supp.), I hereby waive compliance with the provisions of section 4511 R. S. as amended (46 U. S. C. 564), and section 2 of the act of June 19, 1886, as amended (46 U. S. C. 563), to the extent hereinafter set forth:

(1) So much of section 4511 R. S., as amended, and section 2 of the act of June 19, 1886, as amended, as requires shipping articles to contain, in writing or in print, particulars as to the nature of the intended voyage or engagement is waived: *Provided*, That,

(a) The description of voyages on articles of agreement signed covering the departure of vessels of all categories from United States ports shall read:

To a point in the [1] Ocean to the [2] of [3] and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or agency, thereof,

[1] Name of ocean.
[2] Westward, eastward, southward, or northward.
[3] Name of port (New York, San Francisco, etc.).

and back to a final port of discharge [4] in the United States [4] for a term of time not exceeding ———— calendar months.

[4] Here may be inserted, if desired, such stipulations as: "And/or first loading port and/or bunkering port, and the locality where the voyage is to terminate."

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